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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 213

W. N. HORNE, RALPH BLACKBURN AND L. GREEN,
Appellants,

vs.

CITY OF OCALA, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,
Appellee.

STATEMENT PURSUANT TO RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

Pursuant to Rule 12, paragraph 1, of the Rules of the Supreme Court of the United States, the appellants above named, W. N. Horne, Ralph Blackburn, and L. Green, for appeal herein file this statement showing the basis upon which they contend the Supreme Court of the United States has jurisdiction to review the judgment and decree of the Supreme Court of the State of Florida herein.

This case is one in which the validity of a statute of the State of Florida, to-wit: Chapter 15038, Acts of 1931, which Act is hereinafter set forth in extenso, is drawn in question upon the ground that it is repugnant to Section 1 of the

14th Amendment to the Constitution of the United States. The final decision of the Supreme Court of the State of Florida in the last resort in all causes in the State of Florida, the highest court of said State in which a decision in the above entitled cause could be had, is in favor of the validity of said statute.

Therefore, in accordance with Rule 46, Paragraph 2, of the Rules of the Supreme Court of the United States (28 U. S. C. A. Section 354) the Petitioners respectfully show that this case is one in which under the legislation in force when the Act of January 31, 1928 (45 Stat. L. 54), was passed to-wit: under Section 237 of the Judicial Code (28 U. S. C. A. Section 344) a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

Section 237 (a) of the Judicial Code (28 U. S. C. A. Section 344).

> "Sec. 237 (a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state, on the grounds of its being repugnant to the Constitution * * * of the United States and the decision is in favor of its validity may be reviewed by the Supreme Court upon a Writ of Error."

Act of January 31, 1928 (45 Stat. 54).

> "All relief which heretofore could be obtained by Writ of Error shall hereinafter be obtainable by appeal * * * the review of judgments of State Courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such Courts."

Act of April 26, 1928 (45 Stat. 466).

> "Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon,

and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandates shall be applicable to the appeal which the preceding section substitutes for a writ of error."

The Statute of the State of Florida, Chapter 15038, Acts of 1931, the validity of which is involved in this case, is as follows:

CHAPTER 15038—(No. 400)

AN ACT Relating to the Enforcement of Taxes and/or Special Assessments and Interest and Penalties Thereon Imposed by Any Incorporated City or Town in the State of Florida; Providing a Supplemental, Additional, Optional and Alternative Method of Enforcing Such Tax Liens and/or Special Assessments and Interest and Penalties Thereon by Suit in Chancery in the Nature of a Proceeding in Rem Against the Lands Upon Which Such Taxes and/or Special Assessments Constitute Liens; and Prescribing the Practice, Pleading and Procedure in Such Suits and Authorizing the Allowance of Reasonable Attorney's Fees Therein.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF FLORIDA:

SECTION 1. The lien of any and all taxes, tax certificates and special assessments heretofore or hereafter imposed by any incorporated city or town in the State of Florida upon real estate may be foreclosed by such city or town by suit in chancery. The practice, pleading and procedure in any such suit shall be in substantial accordance with the practice, pleading and procedure for the foreclosure of mortgages of real estate, except as herein otherwise provided.

SECTION 2. Suits for the foreclosure of tax liens and/or special assessments under this Act shall be in the nature of proceedings in rem against the lands upon

which said taxes or special assessments are a lien or liens, and it shall not be material that the ownership of said lands be correctly alleged in said proceedings or that parties having an interest or interests in or liens or claims upon said lands be made parties to such proceedings by name or description or be served with process therein, except as hereinafter provided. In any such suit as many lots, parcels or tracts of land, regardless of ownership, and as many tax liens, tax certificates and/or assessment liens may be included in one suit as the complainant may desire. Any judgment or decree that may be rendered in any such suit shall be enforceable only against such lands.

SECTION 3. Such suit may be brought at any time after any one or more of the following events, respectively: (1) After the expiration of two years from the date of any tax certificate issued and held by a city or town whose charter provides for or requires the issuing of tax certificates for delinquent taxes; (2) after the expiration of two years from the date any tax becomes delinquent which was imposed by a city or town whose charter does not provide for or require the issuing of tax certificates; or (3) after the expiration of one year from the date any special assessment or installment thereof becomes due and payable. There may be included in any such suit all or part of the lands upon which tax certificates have been outstanding or taxes have remained delinquent or any special assessment or installment thereof shall have been in default for the respective periods aforesaid, and there may be included therein all claims and demands of said city or town against said lands or any part thereof for taxes, tax certificates and/or special assessments or installments thereof which may be due and payable to such city or town at the time of the institution of such suit.

SECTION 4. Any such suit hereby authorized shall be commenced by bill in chancery in the Circuit Court of the county in which such city or town is situated, in the name of the city or town whose taxes, tax certifi-

cates and/or special assessments are sought to be enforced, as complainant, and against any or all lands upon which any taxes, tax certificates and/or special assessments are delinquent (as the case may be) for the period aforesaid, as defendant, in which bill there shall be briefly described the levy and non-payment of the taxes and/or special assessments which are delinquent for the period aforesaid, and of all other taxes and/or special assessments then due and payable to said city or town and sought to be recovered in such bill, the lands proceeded against and the amount chargeable to each parcel and tract. It shall be unnecessary to name in such bill or proceedings any person or persons owning or having any interest in or lien upon such lands as defendants. At least thirty days prior to the filing of any such bill in chancery, written notice of intention to file the same shall be sent by registered mail to the last known address of the holder of the record title and to the holder of record of each mortgage or other lien, except judgment liens, upon each tract of land to be included in said bill in chancery; such notice shall briefly describe the particular lot or parcel of land, shall state the amount of tax certificate and/or special assessment liens sought to be enforced and shall warn said owner and/or holder of liens, mortgages or other liens that on or after the day therein named said bill in chancery to enforce the same will be filed, unless paid on or before said date.

A certificate of the attorney shall be attached to the bill of complaint to the effect that said written notice has been given, and such certificate shall be prima facie evidence that the provisions of this Section have been complied with. The complainant's counsel shall make diligent inquiry as to the address of the record title and holder of record liens other than judgments and the Clerk of the Circuit Court shall mail by registered mail a copy of the notice hereinafter provided for, to such record owner and holder of record liens, other than judgments at such last known address.

Jurisdiction of any of said lands and of all parties interested therein or having any lien thereon shall be obtained by publication of a notice to be issued as of course by the Clerk of the Circuit Court in which such bill is filed on the request of complainant, once each week for not less than four consecutive weeks directed to all persons and corporations interested in or having any lien or claim upon any of the lands described in said notice and said bill. Such notice shall describe the lands involved and the respective principal amounts sought to be recovered in such suit for taxes, tax certificates and/or special assessments on such respective parcels of land, and requiring all such parties to appear and defend said suit on or before a rule day specified in said notice, which shall be not less than four weeks after the date of the first publication of such notice. Said notice may be in substantially the following form, with blanks appropriately filled in:

"IN THE CIRCUIT COURT FOR —— COUNTY, FLORIDA.

In Chancery.

——— (Name City or Town), Complainant,

vs.

Certain lands upon which ———— (here insert the word 'taxes,' or the words 'special assessments' or both, as the case may be) are delinquent, Defendant.

Notice.

To all persons and corporations interested in or having any lien or claim upon any of the lands described herein:

You are hereby notified that (name city or town) has filed its bill of complaint in the above named court to foreclose delinquent ———————— (here insert the words 'tax liens, tax certificates and/or special assessments' as the case may be) with interest and penalties,

upon the parcels of land set forth in the following schedule, the aggregate amount of such ———— (here insert the words 'tax liens, tax certificates and/or special assessments', as the case may be) interest and penalties, against said respective parcels of land, as set forth in said bill of complaint, being set opposite such parcels in the following schedule, to-wit:

Description of Lands.

Amount of ———— (here insert the word 'taxes', or the words 'special assessments' or both, as the case may be).

In addition to the amounts set opposite each parcel of land in the foregoing schedule, interest and penalties as provided by law, on such delinquent taxes and/or special assessments, together with a proportionate part of the costs and expenses of this suit, are sought to be enforced and foreclosed in this suit.

You are hereby notified to appear and make your defenses to said bill of complaint on or before the —— day of ————, and if you fail to do so on or before said date the bill will be taken as confessed by you and you will be barred from thereafter contesting said suit, and said respective parcels of land will be sold by decree of said Court for nonpayment of said taxes and/or assessments liens and interest and penalties thereon, and the costs of this suit.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Court, the —— day of ————.

————,
Clerk of Said Court,

By ———— ————,
Deputy Clerk."

Proof of publication of said notice, as herein required, shall be by affidavit of the publisher or some agent or employee thereof filed in said cause.

Section 5. Each and every person and/or corporation interested in or having any lien upon any parcel

of land described in the bill of complaint shall be deemed a party to said cause and may appear and defend said cause within the time specified in such notice. Any person or corporation not appearing and defending within such time shall be deemed to have confessed said bill, but the Court may in its discretion and for cause enlarge the time within which any such person may appear and defend said cause. An affidavit or affidavits of the tax collector or other officer of complainant having the duty of issuing and/or collecting such taxes, special assessments or tax certificates, as to the existence of delinquent taxes, tax certificates and/or special assessments upon any parcel of land and the time when the same became due, the amount due thereon, including interest and penalties, and the non-payment thereof shall be received in evidence as prima facie proof of the facts so certified and of the validity of all proceedings in and about the levying and assessment of such taxes and/or special assessments and the issuing of such tax certificate or certificates. Tax Certificates shall be admissible in evidence and shall be prima facie valid. No tax or tax certificate shall be held invalid except upon proof that the property was not subject to taxation or that the taxes had been paid previous to any tax sale or prior to institution of the suit. If any person, firm or corporation shall claim that any tax, tax certificate or assessment is improper or illegal, and seek to contest the same, then such person, firm or corporation at the time of filing an answer resisting the foreclosure of any tax lien, tax certificate or assessment lien shall tender into the registry of the Court such amount as he, they or it claim was properly assessable for which the property of such person, firm or corporation was properly assessable. In all cases where the cause may be decided for the complainant, the judgment for delinquent taxes, tax certificates and/or special assessments against any parcel of land shall include the principal of and interest and penalties on such taxes, tax certificates and/or special assessments, the costs of the suit

and a reasonable attorney's fee, such costs and attorney's fee to be apportioned among and charged against the various parcels of land involved in proportion to the amount of taxes, tax certificates and/or special assessments adjudged against such respective parcels of land. In fixing the fees of complainant's attorney the court shall take into consideration the use which the complainant has made of the privilege hereby given including in one suit divers taxes, tax certificates and/or assessment liens, and if the court be of the opinion that there has been unnecessary separation of causes of action on the same or different parcels of land which might have been joined in the same action, it shall not allow an attorney's fee greater than would have been allowed if the action had been combined. Any such decree shall direct the special master thereby appointed to sell the several parcels of land separately to the highest and best bidder for cash (or, at the option of complainant, to the extent of special assessments including in such judgment, for bonds or interest coupons issued by complainant), at public outcry at the court house door of the county in which such suit is pending, or at such point or place in the complainant municipality as the court in such final decree may direct, after having advertised such sale (which advertisement may include all lands so ordered sold) once each week for two consecutive weeks in some newspaper published in the city or town in which is the complainant or if no such newspaper, in a newspaper published in the county in which the suit is pending, and if all the lands so advertised for sale be not sold on the day specified in such advertisement, such sale shall be continued from day to day until the sale of all such land is completed, such sales shall be subject to confirmation by the Court, and said special master shall, upon confirmation of the sale or sales, deliver to the purchaser or purchasers at said sale a deed of conveyance of the property so sold; provided, however, that in any case where any lands are offered for sale by the special master and

the sum of the tax, tax certificates and/or special assessments, interest, penalties, costs and attorney's fee is not bid for the same, the complainant may bid the whole amount due and the special master shall thereupon convey such parcel or parcels of land to the complainant and the property so bid in by complainant shall become its property in fee simple and may be disposed of by it in the manner provided by law, except that in the sale or disposition of any such lands the city or town may, in its discretion, accept in payment or part payment therefor any bonds or interest coupons constituting liabilities of said city or town. In such judgment or decree the court may, in its discretion, direct the payment of all unpaid State and County taxes and also all unpaid city or town taxes and/or special assessments or installments thereof imposed or falling due since the institution of the suit, with the penalties and costs, out of the proceeds of such foreclosure sale, or it may order and direct such sale or sales to be made subject to such State and County and/or city or town taxes and/or special assessments. Any and all such conveyances by the special master shall vest in the purchaser the fee simple title to the property so sold, subject only to such liens for State and County taxes or taxing districts whose liens are of equal dignity, and liens for municipal taxes and/or special assessments, or installments thereof, as are not directed by the decree of sale to be paid out of the proceeds of said sale.

Section 6. The proceeds of any foreclosure sale authorized by this Act shall be distributed by the special master conducting the sale according to the final decree and if any surplus remains after the payment of the full amount of the decree, costs and attorney's fees and any subsequent tax liens which may be directed by such decree to be paid from the proceeds of sale, such surplus shall be deposited with the Clerk of the court and disbursed under order of the Court.

SECTION 7. Any person or persons interested in any lands included in such suit may redeem such lands at any time prior to the sale thereof by the special master by paying into the registry of the court the amount due for delinquent taxes, interest and penalties thereon and such proportionate part of the expense, attorney's fees and costs of suit as may have been fixed by the court in its decree of sale, or by written stipulation of complainant, and thereupon said lands shall be dismissed from the cause.

SECTION 8. The exercise of the power and provisions conferred in this Act shall be optional with the municipalities and shall not be mandatory upon any municipality of the State of Florida. Any municipality desiring to proceed thereunder may elect to proceed thereunder by formal action of its governing authority and by proceeding as described herein.

SECTION 9. This Act shall not repeal any other statute relating to the subject matter hereof, but shall be deemed to provide a supplemental, additional and alternative method of enforcement of tax liens and/or special assessments for the benefit of all incorporated cities and towns of the State of Florida, whether organized under special act or general laws, and shall be liberally construed to effectuate its purpose.

SECTION 10. This Act shall go into effect on October 1st, 1931.

Approved June 5, 1931.

Judgment was entered by the Supreme Court of the State of Florida on May 21, 1940, and the petition for appeal, which this statement accompanies, is being presented to the said Supreme Court of Florida on the 29th day of May, 1940.

The Act of the Legislature of Florida, Chapter 15038, above quoted, the validity of which is challenged, author-

izes the bringing of a suit in chancery for the foreclosure of special assessments or tax liens claimed to be owing to a municipality by the owner, in the Circuit Court of the County in which the municipality is situated against the lands only, without naming parties defendant thereto other than the lands, and provides for notice to the owner or claimant of the lands by publication of a notice in the form prescribed by the Act; by Section 5 of the Act every person having any interest in the lands is deemed a party thereto and may appear and defend the suit within the time mentioned in the notice, failing in which he is deemed to have confessed the bill. It does not provide for the issuance of nor service upon the owner or claimant of the land any summons or notice other than the notice required to be published in the newspaper.

On January 6, 1939, suit was commenced under this Statute in the Circuit Court for Marion in Chancery, by the City of Ocala, appellee herein, against certain property upon which it claimed to hold certain tax and special assessment liens, there being six tracts described, Parcel Number 2 of which was claimed by the Appellant Horne, the Appellants Blackburn and Green being in possession of the same under him as his tenants; the notice provided for by the Statute was issued by the Clerk of said Circuit Court and duly published; in due course a final decree was taken by the City, who thereafter caused the property claimed by the appellants to be sold at Master's sale, and it became the purchaser thereof, receiving a deed to it from the Master; no summons was issued or served on the appellants or either of them; thereafter, the City demanded possession of the property from the appellants, which demand was refused, and on June 1, 1939, after notice to appellants, it filed its petition in the Circuit Court for Marion County in said cause for a Writ of Assistance to put it into the

possession of the property, and on June 5, 1939, writ was awarded to it, from which order and decree of said court the appellants herein appealed to the Supreme Court of the State of Florida, which was the court of last resort in the State of Florida. Thereafter, on May 21, 1940, said cause having been considered by the Supreme Court, the order and decree so appealed from was affirmed.

The facts upon which the rights of the appellants are based are set forth in the answer of the Appellant Horne to the petition for writ of assistance, and the Federal questions sought to be reviewed were raised by said answer.

In his answer to the petition, he set forth that he was the owner and seized and possessed of the property described in said proceeding as Parcel Number 2; and that Blackburn and Green were in possession as his tenants; that he resided in the City of Ocala and had for many years, and was within the City when said pretended suit was brought, and during the entire time the foreclosure proceedings were pending; that the City Attorney was personally acquainted with him and knew of his interest and possession thereof, and there was no reason why he could not have been advised of the proceedings; that the only notice other than the publication given was that given to him by the City Attorney on the 21st day of November, 1938, before the suit was brought, which advised him that suit would be brought on or after the 23rd day of December, 1938, to enforce the City's claim unless the liens were paid; that no other notice had been given, and that he did not know of the pendency of said proceedings until the holder of the Master's deed demanded possession, which was after the sale had been confirmed to the purchaser, the City of Ocala.

He denied that a writ of assistance should issue to turn him out of possession of the property for the reason that

the proceedings brought by the City of Ocala to foreclose said tax lien were void because:

"a. Chapter 15038 of the Laws of 1931 under which these proceedings were brought, is in violation of both the State and Federal Constitutions in that it permits or attempts to permit the taking of property without due process of law; that it permits foreclosure proceedings against property without making parties defendants, and without giving notice to persons interested, and if it be considered as a proceeding to foreclose sufficient to divest title and permit the taking of possession of property through said proceedings, it violates the provisions of the Federal Constitution, as well as the State Constitution, prohibiting the taking of property without due process of law.

b. The said proceedings brought as aforesaid are not adversary proceedings in which this respondent has had his day in court, and said proceedings as to this respondent, are utterly void and without force and effect.

c. Chapter 15038 of the Laws of 1931 is in derogation of common law and cannot be extended by construction, and said statute in no way authorizes or provides for the taking of possession of the property acquired under said proceedings.

d. Section 15038 of the Laws of 1931, imposes new liabilities and will be strictly construed; therefore, this Court cannot interpolate into it a new right of possession not specifically provided for, and said act not providing for the issuance of a writ of assistance, the issuance of the same is beyond the powers of this Court in said proceedings.

e. The holder of a Master's deed occupies no better position than the holder of a tax deed under a tax sale, and is compelled to proceed legally to acquire possession if he has procured a valid deed by said proceedings.

f. The effect of the issuance of a writ of assistance would be to declare the validity of a tax deed which is not authorized.

g. Section 40 of the City Charter Act provides for the sale of lands in accordance with the provisions of law provided for State taxation and sale, and Section 15038 will not be construed to repeal the Charter Act, the laws of Florida providing for notice to the owner before the tax deed issues.

h. Chapter 15038 of the Laws of 1931, does not in any way authorize a general foreclosure, nor does it provide for the collection of attorneys' fees, nor expenses incurred in procuring abstracts, neither of which is essentially a part of a paving lien or a tax certificate.

Therefore, respondent says, that the failure to name this respondent or his tenants in possession of said lands, as defendants render said proceeding void as to respondent: and respondent says that the issurance of a writ of assistance in this cause to turn respondent out of possession would,

(a) Deprive him of the due process of the law

(b) Take property from him without due process of law

(c) Deny to him the equal protection of the laws."

As stated, the Circuit Court for Marion County overruled and denied these contentions and issued a writ of assistance.

The Federal questions here sought to be reviewed were raised and argued in both the tribunals, namely: the Circuit Court for Marion County and the Supreme Court of Florida, in said cause.

Therefore, the Supreme Court of Florida passed squarely upon the validity and constitutionality of Chapter 15038, of the Laws of 1931, and sustained the validity thereof. It had previously sustained the validity of this Act in another

decision to-wit: in the case of the *City of Coral Gables* v. *Certain Lands*, 110 Fla. 189, 149 So. 36.

The opinion in this case has not yet been officially reported, but a copy thereof is attached to this statement, and attached also is a copy of the opinion of the Supreme Court in the case of the *City of Coral Gables* v. *Certain Lands, supra.*

In the instant case the Supreme Court of Florida fully recognized that the contention we now make that the Act was in contravention of the Federal Constitution was presented, by saying:

> "The former owner of the lands (referring to Horne) for himself and his tenants contested the writ of assistance on grounds challenging the validity of the *in rem* proceedings under which the title to the lands was conveyed to another person by due course of law."

It is to be observed that the decision of the Supreme Court of Florida in the instant case was not a unanimous decision, nor was the decision in the case of the *City of Coral Gables* v. *Certain Lands,* above referred to, a unanimous decision, but in each instance two of the Judges of said court dissented, and in each dissent squarely upheld the contention now made by appellants.

Under the provisions of Article V, Section 5, of the Constitution of the State of Florida, the Supreme Court of the State of Florida is the court of last resort in this case, so far as right of appeal to any court in Florida is concerned.

Therefore the question presented by this appeal is:

DOES AN ACT OF A STATE LEGISLATURE AFFORD DUE PROCESS OF LAW WITHIN THE MEANING OF THE XIVTH AMENDMENT TO THE FEDERAL CONSTITUTION, WHICH AUTHORIZES THE FORECLOSURE OF TAX OR OTHER MUNICIPAL LIENS AGAINST PROPERTY BY A SUIT IN CHANCERY MAKING ONLY THE LANDS PARTY TO SUCH SUIT, WITHOUT SERVICE OF PROCESS, BUT ONLY BY PUB-

LICATION OF A NOTICE OF THE SUIT IN WHICH THE NAME OF NO PERSON IS GIVEN, AND BY MEANS OF WHICH SUIT THE LANDS OF A RESIDENT ARE TAKEN, AND HE IS THEREAFTER EJECTED FROM THE LANDS BY THE DECREE OF THE COURT?

We contend that this question is controlled by the decisions of this Court in the following cases:

Pennoyer v. *Neff*, 95 U. S. 714, 24 L. Ed. 565;
Hager v. *Reclamation Dist. No. 108*, 28 L. Ed. 589;
Scott v. *McNeal*, 154 U. S. 34, 38 L. Ed. 896;
Coe v. *Armour Fertilizer Works*, 237 U. S. 413, 59 L. Ed. 1027.

We further contend that the right to review this case has been fully settled by a long line of decisions:

Hague v. *Committee for Industrial Organization*, 306 U. S. 624, 83 L. Ed. 1028;
Broad River Power Co. v. *State of South Carolina, ex rel. Daniel*, 281 U. S. 537, 74 L. Ed. 1023;
People of the State of New York, ex rel. Bryant v. *Zimmerman*, 278, U. S. 63, 73 L. Ed. 184;
Veix v. *Sixth Ward Building & Loan Association of Newark, New Jersey* (October Term 1939), 84 L. Ed. 685.

It is further submitted that the questions involved herein are substantial; that the effect of the decision of the court below has been to deprive the appellant of his property without due process of law, and that the decisions of the lower court is clearly opposed to the decisions of this Honorable Court in the cases mentioned.

The majority opinion of the court has extended the purpose of the Act beyond that which the Act provides for —a decree *in rem*—in that the court held that these appel-

lants may be removed from the property involved by a proceeding in a Court of Chancery to which they had not been summoned to answer, so as to give effect to an administrative act of the appellee. The Act specifically disclaims any intention of authorizing a judgment *in personem;* yet, the court has extended it to that, entered a judgment of ouster, and the decree of the court to this extent deprives them not only of due process of law, but the equal protection of the laws.

In so doing, the court, we think, has confused the rule of "administrative powers" with "judicial powers."

The purpose of the Act, and the bill filed thereunder, in this case is to enforce through "judicial proceedings" the lien for special or paving assessments alleged to have already been perfected by the "administrative powers" of the municipality, the entry of judgment with additional charges, not confirming, but positively enforcing, the assessment.

The Act relates in no way to the manner and form of making assessments or the issuance of special assessment certificates. It is solely for the foreclosure thereof after being made, and the decisions of this Court referred to in the *Coral Gables* case as sustaining the contention of the majority of the court, relate to proceedings for the making of the assessment as distinct from "judicial proceedings" to enforce it.

The assessment having been made, the "administrative powers" of the municipality are exhausted. The Act provides for an appeal to the "judicial powers" of the State to confirm such administrative action.

In all such cases, due process of law is not afforded where notice is not given, and a provision for extra official notice, or a hearing granted as a matter of favor, is not due process of law.

This question is fully settled in the above case of *Coe* v. *Armour Fertilizer Works.*

The Act of the Legislature is not an emergency Act having only temporary application, but it becomes a permanent part of the Florida Statutory Law, if permitted to stand, drastically affecting the rights of all persons owning property within the limits of any municipality.

We therefore respectfully submit that this Court has jurisdiction of this appeal.

Respectfully submitted,

HOWELL M. HAMPTON,
Attorney for Appellants.

EXHIBIT "A".

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1940. En Banc.

Marion County.

W. N. HORNE, RALPH BLACKBURN, and L. GREEN, Appellants,

vs.

CITY OF OCALA, FLORIDA, a Municipal Corporation Organized and Existing Under the Laws of Florida, Appellee.

Opinion.

Filed May 21, 1940.

An appeal from the Circuit Court for Marion County, J. C. B. Koonce, Judge; H. M. Hampton, for Appellants; W. Robert Smith and John Marshall Green, for Appellee.

WHITFIELD, J.:

The facts are fully stated in the opinion prepared by Mr. Justice Brown.

Taxes are levied not by contract but "in pursuance of law." Sec. 3, Art. IX, Fla. Constitution.

Valid *ad valorem* tax liens upon described lands may be enforced by statutory proceedings *in rem* brought by a governmental taxing unit in which the lands are located against the described lands as defendant without making the owner of the land a party defendant in the suit, Chapter 15038, Acts of 1931; and due process of law may be afforded by giving the owner of the lands fair, adequate and timely notice of the contemplated or pending *in rem* proceedings as may be prescribed by statute. See 1, C. J. S., p. 1148 and authorities cited; 84 Am. Dec. 74.

In this case the statutory notice by registered letter and publication describing the lands, was given to the owner who did not appear in the *in rem* proceedings which by due course resulted in a judgment and a judicial sale and con-

veyance to a third party purchaser who sought writ of assistance to obtain possession of the lands. The former owner of the lands for himself and his tenants contested the writ of assistance on grounds challenging the validity of the *in rem* proceedings under which the title to the lands was conveyed to another person by due course of law.

As the *in rem* proceedings were valid, they are binding on the former owner and his tenants though he did not appear in the proceedings after the statutory notice was given; and as such former owner is bound by the *in rem* judgment and the sale and conveyance of the lands, he has no right to contest the execution of the writ of assistance which was issued under the general provision of the statute that "the practice, pleading and procedure in any such suit shall be in substantial accordance with the practice, pleading and procedure for the foreclosure of mortgages of real estate." See Chap. 15038, Acts of 1931; sec. 69, Chap. 14658, Acts of 1931; 4 Am. Juris., p. 443; 7 C. J. S., p. 8; Ann. Cas. 1913D 1120.

Affirmed. Terrell, C. J., Buford and Thomas, JJ., concur. Brown and Chapman, JJ., dissent.

IN THE SUPREME COURT OF FLORIDA.

January Term, A. D. 1940. Division B.

Marion County.

W. N. HORNE, RALPH BLACKBURN, and L. GREEN, Appellants,

vs.

CITY OF OCALA, FLORIDA, a Municipal Corporation Organized and Existing Under the Laws of Florida, Appellee.

BROWN, *J., dissenting:*

This is an appeal from a decree of the Circuit Court granting writ of assistance to put the City of Ocala, Florida, in possession of certain lands purchased by the City at a foreclosure sale of municipal taxes and paving assessments,

which foreclosure was instituted by the City of Ocala against "Certain Lands Upon Which City of Ocala, Florida, taxes and/or Paving Assessments are Delinquent," under Chapter 15038, Acts of 1931, Six tracts of land were described in the bill, but none of the various owners were named in the bill or made parties defendant. One of the tracts on which it was claimed paving liens were delinquent was owned by the appellant, who had it leased and in the actual occupancy of the two other appellants, Blackburn and Green. The foreclosure proceeded to sale and confirmation thereof, in strict conformity with the statute, and being the highest and best bidder, the property was sold to the City.

On the 23rd day of November, 1938, prior to the filing of the bill in January following, the City Attorney, in compliance with the statute, sent to certain persons, among whom was the appellant, W. N. Horne, a notice that it was the intention of the City of Ocala to enforce the paving liens upon the property now in question, describing same, by a suit in chancery pursuant to Chapter 15038, Laws of 1931 on or after December 23rd, 1938, unless the paving certificates were redeemed pursuant to said statute. Also in pursurance of the statute and of the prayer of the bill publication of notice was made and proof of publication filed, and affidavit made by the clerk. The notice was addressed "To all persons, and corporations interested in or having any lien or claim upon any of the lands described herein;" which was followed by a description of several parcels of land and the amount of the special assessment lien for paving, etc. The notice thus published stated that: "You are hereby notified to appear and make your defense to said bill of complaint on or before the 6th day of February, A. D. 1939, and if you fail to do so on or before said date the bill will be taken as confessed by you and you will be barred from thereafter contesting said suit, and said respective parcels of land will be sold by decree of said court for nonpayment of said taxes and special assessment liens for paving and interest and penalties thereon and the costs of this suit."

This notice did not contain the name of any of the owners or persons interested in any of the described land. Nor did the statute require this to be done.

The decree *pro confesso* was entered by the clerk on February 6, 1939. Complainant then filed an affidavit with the city clerk setting forth the charges against the several different tracts of land, and also one by the tax collector as to certain of the lands, and also affidavit as to attorney's fees. Final decree was entered on March 6, 1939, fixing the amounts, including attorney's fees, and cost of abstract, and in pursuance thereof the master therein appointed, after advertisement describing the several parcels of land, which was published once each week for two consecutive weeks, sold the land at public sale to the City of Ocala and reported the same to the court. The Circuit Court confirmed the sale, requiring all in possession to surrender possession upon production of the deed of the special master.

In its decree ordering the sale of the lands the court retained jurisdiction of the cause "to settle all questions arising herein which have not been settled by this decree or other orders and decree in this cause and to make such other and future orders in connection therewith as shall to it seem meet and proper."

No summons as in chancery were issued, no process was served upon the appellants or either of them, and they did not know of the pendency of the proceedings in court until the City of Ocala through its officers exhibited the master's deed and demanded possession from respondent some time after the sale had been confirmed. Upon refusal of the respondent to deliver possession, application was made to the Circuit Court for writ of assistance, which application was granted by the court and writ of assistance was awarded to the appellee, from which decree the appellants have taken this appeal.

The respondent Horne, appellant here, filed his answer to the application for writ of assistance, setting forth his ownership and possession of the property through and under his tenants Blackburn and Green. His answer shows that he resided in the City of Ocala during the entire pendency of the proceedings, and before that, and was personally acquainted with all of the officers and that there was nothing to prevent service of process; yet he was not

made a party defendant, nor was any effort made to do other than to foreclose against the lands without naming parties; that neither he nor his tenants in possession were notified or had any knowledge of the proceedings until the City demanded possession of the property. He admitted receiving the letter from the City Attorney on November 21, 1938, which warned him that unless the paving assessment was paid a bill in chancery to enforce the same would be filed on or after December 23, 1938. Then he proceeds in his answer to deny that the complainant city was entitled to a writ of assistance to put it into possession of said property and also attacks the constitutional validity of Chapter 15038 on various grounds.

The first question presented by the appellants is whether a municipality which procures a master's deed to lands under the decree of foreclosure of paving certificates in a suit brought under the provisions of Chapter 15038, Laws of 1931, against the lands only, no service or process being effected upon the owner, and the owner not appearing, is entitled to a writ of assistance to put it into possession of the property against the owner who was in possession at all times during the pendency of the proceedings, but had no knowledge thereof until after the master's deed had issued.

As this court has on previous occasions sustained the validity of the act referred to (*City of Coral Gables* v. *Certain Lands*, 110 Fla. 189, 149 So. 36), we will confine ourselves to a discussion of the elementary question of statutory construction which is here presented.

The title of the Act reads as follows:

> "An Act Relating to the Enforcement of Taxes and/or Special Assessments and Interest and Penalties Thereon Imposed by Any Incorporated City or Town in the State of Florida; Providing a Supplemental, Additional, Optional and Alternative Method of Enforcing Such Tax Liens and/or Special Assessments and Interest and Penalties Thereon by Suit in Chancery in the Nature of a Proceeding *in Rem* Against the Lands Upon Which Such Taxes and/or Special Assessments Constitute Liens; and Prescribing the

Practice, Pleading and Procedure in Such Suits and Authorizing the Allowance of Reasonable Attorney's Fees Therein."

While in the body of the statute it is said that "any and all such conveyances by the special master shall vest in the purchaser the fee simple title to the property so sold," nothing is said about the issuance of writs of assistance, either in the title or in the body of the Act.

The statute in question authorizes only proceedings *in rem* otherwise provision should have been made for service of process upon the property owner. The motion for writ of assistance sought relief *in personam*, and the chancellor in granting such motion, granted relief *in personam* against the property owner.

We do not think that it can be held that the notice or letter sent by the City Attorney to the property owner some weeks before the suit was filed was process. See *Coe* v. *Armour Fert. Works*, 237 U. S. 413, 59 L. Ed. 1027, h. n. 6. Process can only issue upon the filing of a suit. Section 4646 Compiled General Laws of 1927. Furthermore, Section 37 of Article V of the Constitution provides that "the style of all process shall be 'the State of Florida' and all procedure shall be conducted in the name and by the authority of the State."

The City Attorney cannot be regarded as an official having authority to issue process.

Nor was the publication of notice directed to the defendant property owner by name. It was only directed to all persons claiming an interest in the lands described in the notice. The Act states that it is providing a method of procedure "in the nature of a proceeding *in rem* against the lands only upon which such taxes and/or special assessments constitute liens." It is true that in the first section of the Act it is stated that: "The practice, pleading and procedure in any such suit shall be in substantial accordance with the practice, pleading and procedure for the foreclosure of mortgages of real estate, except as herein otherwise provided." But then the Act goes on and provides, as indicated by its title, a proceeding *in rem* against the land only. Indeed, as I understand our former deci-

sions, this is the basis upon which this court has upheld the constitutional validity of the Act. If it were not a proceeding *in rem* against the lands only, then service of process upon the owner in person, if he were personally within the jurisdiction of the court, or by publication in due form if he were a non resident or otherwise subject to process by publication, would be essential.

In the case of *City of Coral Gables* v. *Certain Lands, supra,* the appellant City contended that this statute provided a proceeding purely *in rem,* an action against the land itself, and that therefore personal service of process was not required, even as against those owners who live in this State or in the County where the proceedings are had. While there are in the statute some provisions which are inconsistent with a suit purely *in rem,* to give effect to them would render the statute unconstitutional. This court recognized this principle in the case of *City of Coral Gables* v. *Certain Lands, supra,* because in the very beginning of the majority opinion, the second and third paragraphs thereof it is said:

> "It is not necessary for us to quote the provisions of the Act in this opinion, as it is available in the published statutes of this State to all who are sufficiently interested to turn thereto and read the same.
>
> "It is sufficient to say that the Act provides for proceedings *in rem* against the property against which a tax assessment has been made, whether such assessment originated as an *ad valorem* assessment or as a special assessment, where such assessment, or assessments, have become a lien, or liens, upon the property."

Since the famous case of *Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. Ed. 565, it has become axiomatic that as a general rule constructive service by publication is ineffective where the suit is one *in personam.* In the case of *Fleming* v. *Fleming,* 130 Fla. 264, 177 So. 607, this court, speaking through Mr. Justice Buford, held that the notice required by publication, as provided in Section 4 of the Act, was sufficient to give jurisdiction of the lands for the purpose of foreclosing the tax liens held by the City of Lakeland,

but in that opinion, which was concurred in by all the members of the court, it was also held that the notice required to be mailed, under Section 4 of the Act, was directory and not jurisdictional. In that connection the opinion said:

> "In effect, the complainant says that if the statute was complied with she did not receive the notice required to be mailed to her by registered mail and that she did not observe the notice published in a newspaper. The notice required to be mailed thirty days before the institution of the suit, we think could not be held to be jurisdictional. The giving of that notice is directory so that the landowner may have an opportunity to pay off and discharge the tax lien before the institution of suit."
>
> See also in this connection, Baynard *v.* City of St. Petersburg, 130 Fla. 471, 178 So. 150.

We think that the effect of these decisions is that the publication of the notice required by Section 4 of the Act gives the court jurisdiction of the land or *res* in question with full power to foreclose existing tax liens or special assessment liens, including interest and penalties thereon, and that the purchaser at sale is entitled to receive a master's deed which shall vest in the purchaser the fee simple title to the property so sold; provided of course, that the procedure laid down in the Act is properly followed, but the provision with reference to the mailing of notice to the holders of the record title, or mortgage or other lien, to the last known address, by the City Attorney, at least 30 days prior to the filing of the bill, is directory only and is not absolutely essential to the jurisdiction of the court over the land.

Appellee contends that the court below was possessed of power to grant the writ of assistance, as that is the ordinary process issued by a court in chancery to put a person into possession of property to which he is entitled under the decree.

In 4 Am. Jr., 440, it is said:

> "The writ of assistance is a form of process issued by a court of equity to transfer the possession of lands,

the title or right of possession to which it has previously adjudicated, as a means of enforcement of its decree. Instead of turning the party over to a court of law to recover such possession."

And on page 441 of the same volume, the text reads as follows:

"Generally the writ of assistance is employed wherever a court of equity having jurisdiction *of the persons* and the property in controversy has determined the rights of the litigants to the title or possession of property. The power to issue the writ results from the principle that the jurisdiction of the court to enforce its decree is coextensive with its jurisdiction to determine the rights of the parties, and the court will carry its decrees into full execution, where it can do so justly, without relying on the co-operation of any other tribunal. However, the exercise of the power to issue writs of assistance rests in the sound discretion of the court." (Italics supplied.)

In 5 C. J. at page 1320, the rule is stated to be:

"As a rule the writ will issue only against *parties to the suit* or their representatives, or those who came into possession under either of the parties while the suit was pending. In other words, it will operate only on those whose rights have been determined by the judgment or decree, and *will not issue against persons in possession before suit who were not made parties.*" (Italics supplied.)

See also in this connection Ann. Cas. 1913 D, 1120, note; Hair *v.* Commercial Bank of Live Oak, 112 Fla. 499, 152 So. 180.

Appellee further contends that inasmuch as Chapter 15038 expressly provides that the practice, pleading and procedure in mortgage foreclosure proceedings, except as otherwise provided in the act, shall govern in any suit brought under the act, and that the right of a purchaser at a sale in mortgage foreclosure proceedings to have a

writ of assistance is fundamental, the court was justified in granting the writ of assistance in this case.

Furthermore appellee points out that Sections 4 and 5 of the statute provide that jurisdiction of the lands involved, and of all parties interested therein, or having any lien thereon, shall be obtained by the publication of the notice to be issued by the clerk of the Circuit Court, which notice was duly published in this case. Also that the act provides that all persons interested in any parcel of land described in the bill of complaint shall be deemed parties to the cause and may appear and defend the same, and upon failure to appear and defend shall be deemed to have confessed the bill. In support of these contentions appellee also cites the case of West 132 Feet *v.* City of Orlando, 80 Fla. 233, 86 So. 197. In that case, which is hardly applicable here, it was held that where the jurisdictional steps prescribed by the statute appear on the record to have been legally taken, the court has no power to look behind the record into alleged extrinsic facts tending to impeach the jurisdiction at the instance of one who shows no title or interest in the property other than bare possession and who seeks to raise such questions for the benefit of others; that in such a case the legality of the proceedings could not be put in issue by such person and that the action of the lower court in granting the writ would not be disturbed. However, it was stated in the last paragraph of the opinion that:

> "It is not apparent that the order of the Chancellor appealed from could prejudice the rights of the real parties in interest, or any of them, to have the questions suggested by this record, or any other available questions adjudicated in a proper action, but in abundant caution, under the circumstances, the order appealed from should be affirmed expressly without prejudice."

Appellee contends that the respondent to a writ of assistance must either assert a paramount title or question the jurisdiction of the court in the original cause before such respondent can lawfully resist the issuance of a writ

of assistance, citing Hair *v.* Commercial Bank of Live Oak, *supra,* wherein it is said that: "The power to issue a writ of assistance is predicated upon the principle that the jurisdiction of a court of equity to enforce its decrees is coextensive with its jurisdiction to determine the rights of the parties to the suit, thereby enabling the equity court to carry its decree into execution, where it can do so justly without relying upon the cooperation of any other tribunal." It is further contended that a respondent in his answer to an application for a writ of assistance cannot raise constitutional questions which could have been raised in the main suit or by appeal from the final decree therein, without subjecting himself personally to the jurisdiction of the court, thus waiving his right to question the jurisdiction of the court over his person. The determination of these questions depends upon the main question in the case, as to whether or not an action *in rem,* where there is no personal service, can be converted, in part at least, into an action *in personam* by a writ of assistance issued subsequently to the decree in said suit *in rem* as against record owners or persons in possession who were not served with process in the main suit.

In the case of Howard *v.* Milwaukee and St. Paul R. Co., 101 U. S. 837, 25 L. Ed. 1081, the Supreme Court of the United States held that a sale in equity under a prior lien will not impair any rights which belong to the holder of the subsequent lien, if the latter duly asserts his right in proper season; that subsequent incumbrancers, when not made parties to a bill for foreclosure or sale are not bound by the decree; that while the decree is not void, because a second incumbrancer was not made a party to the suit, yet his lien remains in full force notwithstanding the decree of sale entered in such proceedings. In the opinion in that case it was said:

> "By omitting to make the plaintiff a party to the equity proceeding to enforce their lien, the defendants did not deprive the plaintiff of any legal right, nor was he cut off from any equitable rights which under the law had accrued to him in his position as a subsequent judgment creditor. Had the plaintiff been in

> possession of the premises when the decree was rendered and when the sale was made, he could not have been dispossessed by any process issued in the equity suit; the rule being that the writ of assistance cannot go against a stranger in a suit for foreclosure, and that the remedy of the party in such case is ejectment."

As shown by the above citation, the general rule seems to be that as a rule a writ of assistance will issue only against parties to the suit, or their representatives, or those who came into possession under either of the parties while the suit was pending, whereas this was a suit *in rem* against the land and neither the property owner nor the tenants in possession were made parties to the suit. The decree could act only upon the *res*. By such decree the title to the land might have been legally vested in the purchaser to whom the master's deed was delivered. The purchaser's remedy was not by writ of assistance against the property owner, who had not been made a party to the suit by service of process, but his remedy to acquire possession was by a new suit, that is, by an action of ejectment.

In Grannis *v.* Ordean, 234 U. S. 385, 58 L. Ed. 1363, the court said:

> "In a strict sense a proceeding *in rem* is one taken directly against property, and has for its object, the disposition of the property without reference to the title of individual claimants."

See also Hughes *v.* Hughes (Ky.) 278 S. W. 121; Wilson *v.* Smart (Ill.) 155 N. E. 288.

We have expressly held that a writ of assistance should not be issued against one in possession at the time suit was instituted, who was not made a party to the suit and holds possession of the premises in his own right under an independent claim of ownership; that the issuance of a writ of assistance is largely discretionary and should be granted only where the right of the applicant is clear, and where it is doubtful, the writ should be denied. Bunch *v.* High Springs, 76 Fla. 546, 80 So. 319. See also Ray *v.* Trice, 49 Fla. 375, 38 So. 367.

If this act had contained a provision for the enforcement of the decree of foreclosure *in personam*, such provision would have been void because not comprehended by the title of the act, which restricts the act to proceedings *in rem*. Indeed, in the case of City of Coral Gables *v.* Certain Lands, *supra*, Mr. Justice Buford, writing the majority opinion, said:

> "The suit is against the property. In other words, it is a suit *in rem* to enforce the payment of the delinquent tax by sale of the property under foreclosure of the tax lien. The statute warrants no personal judgment against the owner of the property or the owner of any interest therein, or any lien thereon."

The statute, Section 2 of Chapter 15038, disclaims any idea of its enforcement against the individual in the last sentence of Section 2, where it says:

> "Any judgment or decree that may be rendered in any such suit shall be enforceable only against such land."

Thus the statute cannot be so construed as to provide for a personal judgment against the owner of the land, either in the final decree or in some order supplemental to the final decree. And if so construed, the statute would not afford due process of law. Even in an attachment suit, where the defendant has not personally been served, the only judgment that can be entered is one binding the property seized. And to secure possession of realty, the holder of a tax deed thereto must resort to the same legal remedy for possession as the holder of any other deed, which is ordinarily ejectment. 61 C. J. 1395. And we have held that a proceeding to confirm the validity of a tax deed is unknown in this State. It may only be established incidentally by the removal of claims which constitute clouds upon the title of the tax deed holder. Brecht *v.* Bur-Ne Co., 91 Fla. 345, 108 So. 173.

In this case, appellant did not appear and defend the case as was done in the *Coral Gables* and other previous cases. Although he was a resident of Ocala he knew nothing

of the pendency or result of the suit until possession was demanded of him.

This statute is an unusual one, to say the least, and should be strictly construed, and those parts of the statute which are beyond the scope of its title should be disregarded. But with regard to the particular question here involved, the right to take possession is not provided for in the body of the Act. Nor are we advised of any other statutes in relation to tax sales which contain any suggestion that the government should put the purchaser in possession.

Ordinarily in foreclosure suits, the court has general authority to enforce its decrees, by putting the purchaser in possession, but such right depends upon the jurisdiction of the court over the person of the defendant. However, a writ of assistance may not be issued to try a claim of independent right, nor can the equity court usurp the functions of a law court to try the title of adverse claimants who were not made parties to the equity suit. Therefore the provision in the decree that the purchaser at the foreclosure sale be given possession went beyond the provision of the statute. The most that can be said of the sale under the decree is that:

"Such conveyance by the special master shall vest in the purchaser the fee simple title to the property so sold."

For these reasons the order appealed from granting the writ of assistance should in my opinion be reversed.

EXHIBIT "B".

SUPREME COURT OF FLORIDA.

CITY OF CORAL GABLES

vs.

CERTAIN LANDS UPON WHICH TAXES ARE DELINQUENT, et al.

May 10, 1933.

Rehearing Denied July 8, 1933.

1. Motion to quash process and service of process, which motion challenged court's jurisdiction over persons other

than those appearing and challenged constitutionality of mode of procedure prescribed by statute under which suit was brought constituted "general appearance."

2. Motion to quash process and service of process challenging court's jurisdiction over person and property of movant and over other defendants constituted "general appearance."

3. "Due process of law" requires that appropriate procedure duly prescribed, fair notice and reasonable opportunity to be heard be given to interested parties before judgment is rendered. (Const. U. S. Amend. 14; Const. Fla. Declaration of Rights, 12.)

4. Statute respecting enforcement of delinquent taxes by city provides for all notices to interested parties necessary to satisfy due process clause (Acts 1931, c. 15038; Const. U. S. Amend. 14; Const. Fla. Declaration of Rights, 12.)

5. Notice required in proceedings by city to enforce payment of delinquent taxes under statute is "legal notice," which is one in connection with and relating to judicial proceedings, and when read in connection with statute respecting legal notices, statute is sufficiently certain to comply with due process clause (Acts 1931, c. 15038, 4; Comp. Gen. Laws 1927, 4666; Const. U. S. Amend. 14; Const. Fla. Declaration of Rights, 12.)

6. Statute respecting enforcement by city of payment of delinquent taxes by suit in chancery does not warrant personal judgment against owner of property or owner of any interest or lien therein (Acts 1931, c. 15038).

7. Where taxpayer is given notice to be heard in proceeding provided by statute for enforcement by cities of liens for taxes, due process clauses of Federal and State Constitutions are not violated (Acts 1931, c. 15038; Const. U. S. Amend. 14; Const. Fla. Declaration of Rights, 12.)

Ellis and Brown, JJ., dissenting.

En Banc.

Appeal from Circuit Court, Dade County; Worth W. Trammell, Judge.

Suit by the City of Coral Gables against Certain Lands Upon Which Taxes Are Delinquent, Coral Gables, Incorporated, and others. From the decree, complainant appeals.

Affirmed in part, and in part reversed and remanded.

Morton B. Adams, M. McDonald, and Boone T. Coulter, all of Miami, and F. P. Fleming, E. J. L'Engle, and J. W. Shands, all of Jacksonville, for appellant.

Frederick W. Schmitz, of Coral Gables, Clifton D. Benson, Benjamin E. Carey, and Charles R. Pierce, all of Miami, Edward B. Hope, of Coral Gables, Evans & Mershon, M. L. Mershon, and John J. Lindsey, all of Miami, and L. O. Casey of Hollywood, for appellees.

Buford, Justice:

The City of Coral Gables sought to enforce the payment of delinquent taxes by the prosecution of a suit in chancery court under the provisions of chapter 15038, Acts of Legislature of Florida of 1931.

It is not necessary for us to quote the provisions of the act in this opinion, as it is available in the published statutes of this State to all who are sufficiently interested to turn thereto and read the same.

It is sufficient to say that the act provides for proceedings *in rem* against the property against which a tax assessment has been made, whether such assessment originated as an *ad valorem* assessment or as a special assessment where such assessment, or assessments, have become a lien, or liens, upon the property.

The statute further provides that there may be included in one suit all or any part of the lands upon which tax certificates have been outstanding or taxes have remained delinquent or any special assessment or installment thereon shall have been in default for the respective periods named in the act; and that there may be included therein all claims and demands of the municipality against said lands or any part thereof for taxes, tax certificates, and special

assessment, or special assessments, or installments thereof which may be due and payable to the municipality at the time of the institution of the suit.

The act provides the manner in which the suit shall be brought and how jurisdiction may be obtained. That part of the act pertaining to the acquisition of jurisdiction is as follows:

"Jurisdiction of any of said lands and of all parties interested therein or having any lien thereon shall be obtained by publication of a notice to be issued as of course by the Clerk of the Circuit Court in which such bill is filed on the request of complainant, once each week for not less than four consecutive weeks, directed to all persons and corporations interested in or having any lien or claim upon any of the lands described in said notice and said bill. Such notice shall describe the lands involved and the respective principal amounts sought to be recovered in such suit for taxes, tax certificates and/or special assessments on such respective parcels of land, and requiring all such parties to appear and defend said suit on or before a rule day specified in said notice, which shall be not less than four weeks after the date of the first publication of such notice. Said notice may be in substantially the following form, with blanks appropriately filled in; (Then follows the form of notice required)"

(1, 2) There was a special appearance and motion to quash the process and service of process, which motion challenged the jurisdiction of the court over persons other than those appearing, and, second, challenged the constitutionality of the mode of procedure prescribed by the statute under which the suit was brought. The circuit court correctly held that, by filing motion of this character the defendants filing same entered a general appearance. Another special appearance and motion to quash the process and the service of process challenged the jurisdiction of the court over the person of the movant and over the property of the movant involved in the suit. The court held that this motion constituted a general appearance. The motion contested not only the jurisdiction of the court over the

person of the defendant but also the right of the court to take jurisdiction over other defendants in the suit and in so far as the jurisdiction of the court over other defendants is concerned, the grounds thereof involve the merits of the case and constitute a general appearance.

Another ground of the motion filed by Coral Gables, Inc., was "because the mode of proceeding, the mode of service and the mode of constructive service are not due process of law but are violative of the provisions of the Fourteenth Amendment of the Constitution of the United States." This ground challenges the constitutionality of the statute prescribing the method of serving process and also the constitutionality of the mode of proceeding therein provided, which included all that the statute required to be done to authorize the foreclosure of such tax liens, and included, not only an attack upon the service of process, but likewise an attack on all other proceedings taken in the case, and the motion was therefore one which presented other issues than the jurisdiction of the court over the defendant.

The holding of the circuit court that the filing of those motions constituted general appearances is supported by the opinions and judgments in the cases of Ortell *v.* Ortell, 91, Fla. 50, 107 So. 442; Casper et al. *v.* Bonbright et al., 94 Fla. 1237, 115 So. 540; First National Bank *v.* Board of Public Instruction, 93 Fla. 182, 111 So. 521; State ex rel. Pepper v. Atkinson, 98 Fla. 996, 124 So. 458 and cases there cited.

This case presents no question concerning the validity of the assessment and levy or the creation of the lien by the proper procedure on the part of the taxing officials. We are asked to consider and deal only with the questions which are presented by the challenge of the right of the city to pursue the procedure authorized under chapter 15038, *supra*. It is contended that the procedure prescribed by this statute results in owners and claimants of other interests in property being deprived of their property without due process of law, and the appeal is from a judgment of the circuit court which in effect holds the act unconstitutional on that ground.

(3) In Fiehe *v.* R. E. Householder Co., 98 Fla. 627, 125 So. 2, we adopted the general definition found in 6 R. C. L. 446, of the essential elements of due process of law, and in Tibbetts *v.* Olson, 91 Fla. 824, 108 So. 679, 688, Mr. Justice Whitfield, speaking for the court, said:

"The Constitution is designed to prescribe and limit governmental powers and to secure individual rights against unlawful invasion by public officers or by private parties. The courts are required to adjudicate rights 'by due course of law,' the essence of which is that, by appropriate procedure, duly prescribed, fair notice and a reasonable opportunity to be heard shall be given to interested parties before judgment or decree is rendered."

Due process of law in connection with the enforcement of liens for taxes is not to be confused with, and measured by, the same standards as must be the requirements of due process of law when rights are sought to be enforced between individuals.

Mr. Cooley in his excellent work on Taxation, vol. 3, 1326 (4th Ed.) says:

"Very summary remedies have been allowed, in every age and country, for the collection by the government of its revenues. They have been considered a matter of State necessity. Without them it might be possible for a party which had been defeated in its efforts to obtain possession of the government in the constitutional way, to cripple the government for the time being, and possibly to break it up altogether. If the State might be deprived of the resources for continuing its existence and performing its regular functions until a revenue could be collected by the processes provided for the enforcement of debts owing to individuals, it would be continually at the mercy of factions and discontented parties. Obviously, this could not be tolerated. The protective principles of the common law are not supposed to be violated by a resort to summary proceedings in these cases. Summary processes are not necessarily unjust, though they would be so if they deprived the party of a hearing or if they precluded the opportunity for a patient and deliberate examination of the questions upon

which his rights depend, before such rights could be finally concluded and cut off. But it is not the design of legitimate tax legislation to do this in any case. It may depart widely in its methods from those reported to for the enforcement of rights at the common law, but the fundamental rules of justice will be observed and, in theory at least, revenue laws will careful be for the protection of individual rights."

In the case of Leigh *v.* Green, 193, U. S. 79, 24 S. Ct. 390, 48 L. Ed. 623 the Supreme Court of the United States had under review the judgment of the Supreme Court of the State of Nebraska obtained in a suit under the statutes of Nebraska for the enforcement of liens for taxes by sale of the property. That statute provided for service of process in section 4 thereof (Comp. St. Neb. 1899, 4481), as follows:

"Service of process in causes instituted under this chapter shall be the same as provided by law in similar causes in the district courts, and where the owner of the land is not known, the action may be brought against the land itself, but in such case the service must be as in the case of a non-resident; if the action is commenced against a person who disclaims the land, the land itself may be substituted by order of court for the defendant, and the action continued for publication."

The court, speaking through Mr. Justice Day, in the same case, said:

"A motion is made to dismiss because the claim of impairment of a right secured by the 14th Amendment was not made in the courts of Nebraska until the motion for rehearing was filed in the Supreme Court. We are unable to discover a specific claim of this character made prior to the motion for rehearing. In the motion reference is made to the failure of the Nebraska Supreme Court to decide the claim theretofore made, that the statute of Nebraska was unconstitutional because of the alleged violation of the right to due process of law guaranteed by the 14th Amendment to the Constitution of the United States. Be this as it may, the Supreme Court of Nebraska entertained the motion and decided the Federal question raised against

the contention of the plaintiff in error. In such case the question is reviewable here, although first presented in the motion for rehearing. Mallett *v.* North Carolina, 181 U. S. 589, 21 S. Ct. 730, 45 L. Ed. 1015.

"The Federal question presented for our consideration is briefly this: Is the Nebraska statute under which the sale was made and under which the defendant in error claims title, in failing to make provision for service of notice of the pendency of the proceedings upon a lienholder, such as Patrick, a deprivation of property of the lienholder without due process of law within the protection of the fourteenth Amendment?

"The statutes of Nebraska under which the conveyances were made to the Farmers' Loan & Trust Company are given in the margin.

"The evident purpose of Sec. 4, where the owner of the land is unknown, is to permit a proceeding *in rem*, against the land itself, with a provision for service as in case of a nonresident. By Sec. 6 it is provided that in cases where the land itself is made defendant the deed shall be an absolute bar against all persons, unless the court proceedings are void for want of jurisdiction. The object and intent of the action is defined to be 'to create a new and independent title, by virtue of the sale, entirely unconnected with all prior titles.'

"The Supreme Court of Nebraska has held that the term 'owner' as used in the 4th section, applies to the owner of the fee, and does not include a person holding a lien upon the premises. It is this section (4) and section 6 which are alleged to be in conflict with the 14th Amendment. The argument for the appellant concedes that the State may adopt summary or even stringent measures for the collection of taxes so long as they are 'administrative' in their character; and it is admitted that such proceedings will not devest the citizen of his property without due process of law, although had without notice of assessments or levy, or of his delinquency and the forfeiture of his lands. But the argument is, that when the State goes into court and invokes judicial power to give effect to a lien upon property, although created to secure the payment of taxes, the

same principles and rules prevail which govern private citizens seeking judicial remedies, and require service on all interested parties within the jurisdiction. The right to levy and collect taxes has always been recognized as one of the supreme powers of the State, essential to its maintenance, and for the enforcement of which the legislature may resort to such remedies as it chooses, keeping within those which do not impair the constitutional rights of the citizen. Whether property is taken without due process of law depends upon the nature of each particular case. If it be such an exercise of power 'as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the classes to which the one in question belongs,' it is due process of law. Cooley, Const. Lim. 7th Ed. 506.

"The most summary methods of seizure and sale for the satisfaction of taxes and public dues have been held to be authorized and not to amount to the taking of property without due process of law, as a seizure and sale of property upon warrant issued on ascertainment of the amount due by an administrative officer (*Den ex dem.*) Murray *v.* Hoboken Land & Improv. Co., 18 How. 272, 15 L. Ed. 372, the seizure and forfeiture of distilled spirits for the payment of the tax (Henderson's Distilled Spirits, 14 Wall, 44, 20 L. Ed. 815). The subject underwent a thorough examination in the case of Davidson *v.* New Orleans, 96 U. S. 97, 24 L. Ed. 616, in which Mr. Justice Miller, while recognizing the difficulty of defining satisfactorily due process of law in terms which shall apply to all cases, and the desirability of judicial determination upon each case as it arises, used this language: 'That whenever, by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some limited portion of the community; and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary court of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case—the judgment in such proceedings cannot be said to deprive the owner of

his property without due process of law, however obnoxious it may be to other objections.' "

In *George Hagar* v. *Reclamation District No. 108*, 111 U. S. 701, 4 S. Ct. 663, 667, 28 L. Ed. 569, the Supreme Court of the United States, speaking through Mr. Justice Field, said:

"The objections urged to the validity of the assessment on federal grounds are substantially these: that the law under which the assessment was made and levie conflicts with the clause of the fourteenth amendment of the Constitution declaring that no state shall deprive any person of life, liberty, or property without due process of law; and impairs the obligation of the contract between California and the United States, that the proceeds of the swamp and overflowed lands ceded by the Arkansas act shall be expended in reclaiming them.

"That clause of the fourteenth amendment is found in almost identical language in the several state constitutions, and is intended as additional security against the arbitrary deprivation of life and liberty and the arbitrary spoliation of property. Neither can be taken without due process of law. What constitutes that process it may be difficult to define with precision so as to cover all cases. It is no doubt wiser, as stated by Mr. Justice Miller in Davidson *v.* New Orleans, to arrive at its meaning 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' 96 U. S. 104 (24 L. Ed. 619). It is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of

those general rules established in our system of jurisprudence for the security of private rights. Hurtado *v.* California, 110 U. S. 516, 536, 4 S. Ct. 111, 292 (28 L. Ed. 232).

"The appellant contends that this fundamental principal was violated in the assessment of his property, inasmuch as it was made without notice to him, or without his being afforded any opportunity to be heard respecting it; the law authorizing it containing no provision for such notice or hearing. His contention is that notice and opportunity to be heard are essential to render any proceeding due process of law which may lead to the deprivation of life, liberty, or property. Undoubtedly, where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments."

And again in the same opinion it is said:

"Of the different kinds of taxes which the state may impose there is a vast number of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as poll-taxes, license taxes (not dependent upon the extent of his business), and, generally, specific taxes on things or persons or occupations. In such cases the legislature in authorizing the tax fixes its amount, and that is the end of the matter. If the tax be not paid the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of the evi-

dence, or other element of a judicial nature, and nothing could be changed by hearing the tax-payer."

In Davidson *v.* Board of Administrators of the City of New Orleans, etc., 96 U. S. 97, 104, 24 L. Ed. 616, the Supreme Court of the United States, speaking through Mr. Justice Miller, said:

"There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law.

"But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. This court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce, and other powers conferred on the Federal government, or limitations imposed upon the States.

"As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us;

"That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

In the case of Winona & St. Peter Land Co. *v.* State of Minnesota, 159 U. S. 526, 16 S. Ct. 83, 86, 40 L. Ed. 247, the court had under consideration a statute of the State of Minnesota which provided for the enforcement of the tax lien in summary proceedings to be instituted by the county auditor. The statute provided that the filing of the list prescribed verified by the affidavit of the county auditor should be considered the filing of a complaint by the county against the piece or parcel of land therein described to enforce payment of the taxes and penalties appearing against it. The statute required publication to be made of the list, together with the notice in the form prescribed, for at least two weeks in some newspaper of general circulation in the county. It provided that, "upon the final publication of this notice, the jurisdiction of the court over the property attaches." The statute then provided for owners and others interested to appear and defend. In regard to the sufficiency of the notice required, the court, speaking through Mr. Justice Brewer, said:

"That the notice is not personal, but by publication is not sufficient to vitiate it. Where, as here, the statute prescribes the court in which and the time at which the various steps in the collection proceedings shall be taken, a notice by publication to all parties interested to appear and defend is suitable, and one that sufficiently answers the demand of due process of law. State Railroad Tax Cases (Taylor *v.* Secor), 92 U. S. 575, 609 (23 L. Ed. 663,

672); Hagar *v.* Reclamation Dist. No. 108, 111 U. S. 701, 710, 4 S. Ct. 663 (28 L. Ed. 569, 572); Kentucky Railroad Tax Cases (Cincinnati N. O. & T. P. R. Co *v.* Kentucky), 115 U. S. 321, 6 S. Ct. 57 (29 L. Ed. 414); Lent *v.* Tillson, 140 U. S. 316, 328, 11 S. Ct. 825 (35 L. Ed. 419, 425); Pittsburg, C. C. & St. L. R. Co. *v.* Backus, 154 U. S. 421, 14 S. Ct. 1114 (38 L. Ed. 1031). It cannot be doubted, under these various authorities, that, in respect to the collection of these taxes, ample provision is made for notice, and, therefore, that it cannot be adjudged that the owner is, for want thereof, deprived of his property without due process of law."

(4) The statute here under consideration requires that at least thirty days prior to the filing of the bill for the foreclosure of the lien written notice of intention to file same should be sent by registered mail to the last known address of the holder of the record title and to the holder of record of such mortgage or other lien, except judgment liens, upon each tract of land to be included in such bill in chancery. It requires the publication of notice to all persons or corporations interested in or having any lien or claim upon the lands against which foreclosure suit is filed once a week for at least four consecutive weeks prior to the return day and the mailing of a copy of such notice to the holder of record title to the holders of record liens other than judgments at the last known address by the clerk of the circuit court in which the suit is filed.

Therefore the statute has provided for all notices to interested parties which is essential to satisfy the due process clause as contained in the Fourteenth Amendment to the Federal Constitution.

(5) It is contended that the provision of the statute contained in section 4 hereinabove quoted directing publication of notice to be issued is so vague, indefinite, and uncertain as to be ineffectual to comply with the due process clause of the Federal Constitution. In connection with this clause of the statute, we must read such other provisions of law as may be applicable thereto. This, of course, is a legal notice, being one in connection with and relating

to judicial proceedings. Section 2942, R. G. S. section 4666, C. G. L., provides as follows:

"Official and legal advertisements relating to any proceedings in any court in this State, and all legal notices and advertisements of sheriffs or tax collectors, unless otherwise provided by law, shall be published in the newspaper printed either wholly or in part in the county where such publication is required to be made."

When this section is read in connection with the provisions of the act here under consideration, we find that the published notice required by the act is required to be published in a newspaper printed either in whole or in part in the county where such publication is required to be made. The record shows that such provisions of law were complied with.

(6) The suit is against the property. In other words, it is a suit *in rem* to enforce the payment of the delinquent tax by sale of the property under foreclosure of the tax lien. The statute warrants no personal judgment against the owner of the property or the owner of any interest therein, or any lien thereon. It constitutes a valid provision for the enforcement of the tax lawfully levied and assessed against the property within the municipality.

(7) On authority of the opinion in the cases hereinbefore cited, we hold that neither the due process clause of the Federal Constitution (Amendment 14) or section 12 of the Declaration of Rights of the state is violated if the taxpayer is given notice to be heard in the proceedings which may be provided by statute for the enforcement of the lien for taxes. It is not necessary for us to determine in this case whether a notice and opportunity to be heard in the proceedings for the assessment of a tax would suffice to satisfy the organic provisions above referred to, if enforcement of the collection was sought in a judicial proceeding without notice of such proceeding, though there are some authorities which so hold, because the statute authorizing summary proceedings invoked in this case provides for ample notice to, and opportunity to be heard by, all inter-

tested parties, and is sufficient to vest the court with jurisdiction of the subject matter of the suit.

The decree of the chancellor holding the motion to quash to be the equivalent of general appearance is affirmed. The decree, in so far as it holds the act under consideration invalid because of being in conflict with the due process clause as contained in the Fourteenth Amendment to the Federal Constitution, or in conflict with Section 12 of the Declaration of Rights of the state of Florida, should be reversed and the cause remanded for further proceedings not inconsistent with this opinion. It is so ordered.

Davis, C. J. and Whitfield and Terrell, JJ., concur.

Ellis and Brown, JJ., dissent.

Davis, Chief Justice (concurring).

It seems to me that the statute is well within the definition of what constitutes constitutional due process of law as recently restated by the Supreme Court of the United States in American Surety Co. *v.* Baldwin, 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231. Every opportunity to defend is given the property owner and the tax statutes by themselves and in their operation put delinquent taxpayers on constant notice that the particular statute here invoked may be resorted to after a certain elapsed period. The court below can administer the act so as to prevent undue harshness in its enforcement.

Ellis, Justice (dissenting).

I agree to the conclusions reached by Mr. Justice Brown. From the standpoint of equity, which we have been taught was the outgrowth of the struggles of conscience to provide relief in meritorious cases, which would not or could not be obtained through the inflexible rules of law, or which by reason of its universality was inefficient to administer the particular relief, the provisions of chapter 15038, Acts of 1931, cannot be adequately denounced.

In the first place, the title of the act is indicative of the superficially meticulous care with which it is written. It has at least three objects, not to say three distinct subjects: Taxes, penalties for nonpayment, and enforcement by suit in chancery. It is an effort to enlarge the chancery jurisdiction of the circuit court. It imposes penalties for the

nonpayment of the amounts apparently due upon the face of the tax certificates, although such certificates carry the penalties and costs incurred for the failure to pay the tax assessed before the sale. It purports to vest the circuit court with jurisdiction which it did not possess at common law, nor under the Constitution. It undertakes to prescribe the "practice, pleading and procedure" in the suits which it purports to authorize.

The purpose of the act as indicated by its title are manifold even if by a liberal construction it may be translated into one subject and matter properly connected therewith. It is exceedingly doubtful, however, if not impossible, for the court to "fold its (the statute's fault) fault in cleanly coined excuses." It confers a special privilege upon municipal corporations; it creates exceptions to general statutes; it is in derogation of common rights; it is of a penal nature; it gives power to subordinate local authorities. A liberal construction would, if acted upon, produce absurd results, as so ably pointed out by Mr. Justice Brown. According to the rules of statutory construction, the act should be strictly construed. See Russell *v.* Sebastian, 233 U. S. 195, 34 S. Ct. 517, 58 L. Ed. 912 Ann. Cas. 1914A, 152; Tracy *v.* Borough of Keansburg, 99 N. J. Law 35, 122 A 536; People *v.* State Board of Tax Com'rs, 174 N. Y. 417, 67 N. E. 69, 63 L. R. A. 884, text 895, 105 Am. St. Rep. 674; Tampa & Jacksonville R. Co. *v.* Catts, 79 Fla. 235, 85 So. 364; Frazier & Son *v.* Leas, 127 Md. 572, 96 A 764; Ekern *v.* McGovern, 154 Wis. 157, 142 N. W. 595, 46 L. R. A. (N. S.) 706; McDonnell *v.* Murnan Shipbuilding Corporation, 210 Ala. 611, 98 So. 887; Atlantic Coast Line R. Co. *v.* State, 73 Fla. 609, 74 So. 595; 59 C. J. 1110, 1124, 1131.

Authorities could be extended in this citation very greatly. The general doctrine is so well recognized, however, by the bench and bar not only of this jurisdiction but all others in this country as to render any further references to the authorities a work of supererogation. The only question is whether the criticism is inept.

Now the title of the act for purposes of its interpretation of construction constitutes part of the act. See *Ex parte* Knight, 52 Fla. 144, 41 So. 786, 120 Am. St. Rep.

191; State ex rel Attorney General *v.* Green, 36 Fla. 154, 18 So. 334, 336; article 3, section 16. Const.

The clearest and most cogent reason which has been given by this court for the existence of the above-cited constitutional provision was given by Mr. Chief Justice Mabry in State ex rel Attorney General *v.* Green, *supra.* Quoting in part from Judge Cooley, he said the reason consists, " 'first, to prevent hodge-podge or "log-rolling" legislation; second, to prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire.' "

Assuming then, that the criticism of the act as above made is not inept, and applying the rule of strict construction to the title, the first element of doubt arises in determining whether the subject of the act relates to taxes or special assessments. The symbol "and/or" is used by those who have, or assume to have a superaccurate conception of the meaning of English terms to convey the idea that the one or the other or both substantives are embraced within the symbol. If, therefore, the one or the other name may be taken in a strict construction of the title, I submit that it is proper to accept that alternative which will restrict the attempted delegated power to a narrower field of operation where the power attempted to be delegated is subject to the criticisms made herein of the purpose of the act. In this view, the subject of the act, as expressed in the title would be an act relating to "Special Assessments," and would therefore be inapplicable to the case at bar.

Again, in reference to the method of enforcing the so-called lien, the title states that the act provides a "Supplemental, Additional, Optional and Alternative" method. The terms "Supplemental" and "Additional" have the same meaning. They convey the idea of "addition to supply what

is wanted." Webster's International Dictionary. The term "Supplemental" was not used in the restricted legal sense as applicable to bills in chancery, indeed, such a meaning would be absurd, because the method prescribed by law for the enforcement or collection of taxes whether *ad valorem* or special assessments has no defects. Whatever defects may exist in a particular *ad valorem* assessment or special assessment is the result, not of any imperfection in the law, but in the negligent or inefficient administration of it by the officials who have charge of such administration.

It is hardly to be assumed that the Legislature conceded the universal existence of negligence and inefficiency on the part of city officials and proceeded to provide a method for the enforcement of the payment of taxes by way of "supplemental" proceedings to cure the universal errors appearing in all assessments caused by the incompetence of city officials. If such was the purpose of the act, and notice of the same had been given in the title, it is reasonable to imagine a vigorous protest arising from the scandalized city officials against such impeachment of their qualifications as public servants, if not also from their constituents which selected such officials. I take it, therefore, that the term "supplemental" was not used in the narrow sense given to it in chancery proceedings. The terms "optional" and "alternative" are also worthy of some attention that an adequate notion may be obtained of the thought produced in the composite mind of the Legislature which found expression in this remarkable piece of legislation, if it may be designated by that term.

"Alternative" means in the title two methods offered to the city or town's choice, one or the other of which must be accepted; the choice of one excludes the choice of the other. "Optional" has the meaning of choice without compulsion, and expresses more fully the liberty of choice. See Webster's International Dictionary. So the meaning of the four words is that a method is to be provided for the enforcement of taxes which is in addition to that already provided which may be chosen or not as the city or town may elect.

What, then, is the other method to which the one attempted to be provided by the act is additional or to which

it may be preferred? The answer is not to be found in the provisions of the act.

The term "tax certificates" shows that the method provided by law, namely, the sale of the property for the unpaid tax, has already been exhausted. There is no provision of law that a "tax certificate," the certificate issued to a purchaser at a tax sale, where the land is put up for sale to pay the tax assessed and levied against it, is a continuation of the original tax lien. If a lien exists, it must be by virtue of some statutory provision. It is not a continuation of the original tax lien, because that lien was extinguished by the sale of the land. The tax certificate carries a new debt, at least a debt in a larger sum augmented by the expenses of the sale, and bears a usurious interest which in grace has been called a penalty. If a tax certificate lien exists, it must be either because the tax lien in favor of the city, which accrued upon the assessment and levy of taxes, is the thing that is sold at tax sale and the original tax lien is continued with added penalties into the certificate, or it must exist by virtue of a statute.

It is true the contrary has been held by this court, but the point was never discussed, and rests upon no authority.

The act under consideration seems to recognize the distinction, because in the first section it deals with "the lien of any and all taxes, tax certificates and special assessments." If the lien of "taxes" is identical with that of "tax certificates," then the language employed in the act is tautologous, pleonastic, which may be the better word.

The method of enforcement provided by the act is a "Suit in Chancery in the Nature of a Proceeding in Rem against the Lands Upon Which Such Taxes and/or Special Assessments Constitute Liens." There is no mention in the title of tax certificates. A tax certificate is merely a certificate issued by the tax collector that the land described in the certificate has been sold under the law for the payment of the tax assessed against the land. In this state the method provided by law for the enforcement of the collection of taxes, the enforcement of the tax lien is by sale of the land. When the land is sold, the tax lien is extinguished. At the sale the purchaser, whether state, county, city, or individual, acquires a right superior to all others to a title to

the land; a title which carries with it the right to possession and use of the property sold. The vesting of the title is subject to the right of redemption by the owner, which right expires in due time. If the State or the taxing agency is the purchaser, the title vests *eo instanti* upon the expiration of time allowed for redemption. If an individual is the purchaser, he becomes entitled to a deed from the taxing agency or state upon complying with certain conditions.

A suit in equity may only be maintained for the foreclosure of a tax lien on land when such proceeding is directly authorized by statute, but not when the statutory remedy by advertisement and sale of the property is intended to be exclusive, or is available and adequate. A sale of the land under the statute is an administrative method of enforcement. A suit in equity for foreclosure of the lien is judicial. This doctrine is universally recognized by the authorities.

In Virginia a court of equity has no jurisdiction to enforce a lien on real estate given by a statute for taxes assessed thereon, since such lien is purely legal in its character, and can be enforced only in the mode provided by the law of its creation. See Marye *v.* Diggs, 98 Va. 749, 37, S. E. 315, 51 L. R. A. 902. See 61 C. J. 1514-1685, title "Sale of Land for Delinquent Taxes."

I realize that this court has advanced theories different from those expressed above concerning the nature and character of the so-called "Tax Certificates," but it is not the function of courts to make law, although it has been said by some authors that they sometimes do, and articles have appeared in legal publications on "Court Made Law."

However, that may be, the act in question carries a title which does not give the constitutionality requisite notice of its subject and the matter properly connected therewith. The matter of enforcing "Tax Certificates" is foreign to the subject expressed in the title. The attempt to confer jurisdiction upon a court of equity to enforce a tax lien is an effort to transmute a purely legal lien into a kind of equitable lien. Such a power does not exist in the Legislature in view of the constitutional jurisdiction of our courts of equity, and has no foundation in authority.

The theory that a so-called "tax certificate" is a continuation of the original state or city lien for taxes is unwarranted by authority and utterly groundless in reason. It is not true when an individual purchases land at tax sale and obtains a certificate because the debt due to the state or city for the tax levied has been paid by him. The debt being extinguished, the lien is extinguished because there can be no lien without a debt, just as there can be no mortgage lien without a debt. Nelson *v.* Stockton Mtg. Co., 100 Fla. (part 2) 1191, 130 So. 764, where the principle was applied.

In cases where the state or city becomes the purchaser, if the original tax lien is continued, the state or city has just what it had before the sale; namely, a "lien for taxes." But a lien for taxes may not be enforced in equity because it is a purely legal or statutory lien, and the enforcement of legal or statutory liens does not constitute a basis of equity jurisdiction; provision being made by statute for the enforcement of such liens by administrative process of which the state or city has already availed itself by sale of the land. A sale by order of court could accomplish no more. Statutes which provide for the foreclosure of such so-called tax certificates therefore upon the theory mentioned are merely an effort to transmute a purely legal, statutory, or administrative process into a judicial process.

In the case of a purchase of the land at tax sale for an individual, the doctrine of subrogation does not apply, because that which the individual purchaser at a tax sale acquires is an equitable interest in the land so nearly akin to an interest in real estate that it descends to the heir and not to the executor or administrator upon the death of the purchaser. See Eaton *v.* Suprevisors of Manitowoc County, 44 Wis. 489, text 492.

While the "Tax Certificates," which is a receipt only required by law to be issued by the tax collecter to the purchaser of the payment of taxes, does not pass title to the land, it is in fact legal evidence on which the purchaser is entitled to a deed or the redemption money, and is prima facie evidence of the facts related therein. Keeler *v.* Hawk, 19 Okla. 407, 91, P. 778. But a lien is no interest in or right to real estate.

Now the act under consideration provides for the enforcement of taxes imposed by any incorporated city or town by suit in chancery after the expiration of two years from the date of a "tax certificate," or after any "tax" becomes delinquent by cities whose charter does not require or provide for issuing "tax certificates." A tax certificate is merely a receipt for taxes paid by sale of the land, and the tax collecter is not required to make out and deliver such receipt unless the statute requires it. Therefore land may be sold for the taxes levied and assessed, and purchasers may appear and buy the land at the sale, yet the statute may not require the issuing of a certificate or receipt to the purchaser. The record made by the tax collector is sufficient evidence of the purchasers' rights. So there is no significance in the provisions that suit may be brought for the tax where the charter does not provide for the issuing of "tax certificates," *non constat*, but the land was sold and the "tax lien" extinguished.

The act is most drastic in its provisions. A city may levy and assess taxes, when they become delinquent there may be no sale, the city may wait two years and then turn the tax roll over to the attorney to proceed as in his judgment he should proceed. Section 3, c 15038, *supra*. It is provided that there may be included in the suit "all claims and demands of said city or town against said lands or any part thereof for *taxes, tax certificates and/or* special assessments or installments thereof which may be due and payable to such city or town at the time of the institution of such suit." (Italics ours.) A proceeding in violation of the doctrine that a tax sale may be made only for the tax levied in the year for which the tax is levied in violation of the doctrine that two different causes of action may not be combined in one suit. It opens an opportunity for abuse of power in unlawful discriminations in favor of some individuals against whom no action may be taken and against others against whom action is taken. It imposes penalties in the form of additional expenses, costs and attorney's fees; in a few words, it provides a means by which local political organizations may manipulate power by punishing the unfriendly and rewarding the

"faithful," to the perpetuation of the existing local political power.

The practical working of the statute, that is to say, how it may be used to annoy and oppress the people by infringing upon their common rights, has been ably presented by Mr. Justice Brown, in whose opinion I fully concur. The drastic provisions of the statute, the penalties imposed, the extraordinary and oppressive use which it undertakes to enable municipalities to make of its provisions through the forum of a court of equity, are so offensive to conscience that its own terms condemn it as an attempted exercise of unlawful power.

Brown, Justice (dissenting).

This suit, and the statute under which it was brought, are novelties in Florida jurisprudence. Here we have a suit against 10,000 or more lots or parcels of land, estimated to be owned by some 3,000 or more separate and unrelated individuals and corporations, not a single one of whom are made parties defendant, and yet whose rights, titles, and interests in such respective lots are proposed to be adjudicated and disposed of, finally and forever, without service of process, in this one fell swoop of wholesale judicial action—an application of the modern industrial idea of mass production to judicial proceedings. True, the mere fact that this statute is a novel one in this state does not condemn its validity, but it does justify its careful scrutiny. The mere reading of the statute (chapter 15038) gives one reasonably versed in the traditions and principles of Florida jurisprudence a distinct shock. It has been a time-honored construction of the due process clauses of the state and Federal Constitutions by the courts of this state that, however liberal may be the application of those principles to mere adminstrative action, such as the assessment and levy of taxes and the conducting of tax sales, the validity of which may be reviewed in the courts, yet, when it comes to judicial proceedings, in which the citizen's rights of life, liberty, and property are to be adjudicated and determined finally and conclusively, the citizen must be personally served with process, if he reside within the state, and constructive service by publication of notice in a newspaper can only be resorted to

where the citizen defendant is either a non-resident of the state or his place of residence is unknown. Tibbetts *v.* Olson, 91 Fla. 824, 108 So. 679; 12 C. J. 1231. Certainly, the mailing of a notice by an attorney for the city of an intention to file suit, or the publication of a notice by the clerk, not addressed to the owners, but merely describing the lands, is not the equivalent of judicial process issued by a court through a court officer to appear and answer a suit already begun, and served by some duly authorized officer of the court on the known resident owners, or constructive service by publication in the usual way to non-resident or unknown owners. Constructive service is predicated upon necessity, McDaniel *v.* McElvy, 91 Fla. 770, 108 So. 820, 51 A. L. R. 731.

But the appellant contends that this statute provides for a proceeding purely *in rem*, an action against the land itself, and that therefore personal service of process is not required, even as against those owners who live in this state, or even in the very county where the proceedings are had. This argument is plausible, but specious.

He "who spake as never man spake" said on one occasion, in substance, that we should not judge by "the appearance," but that we should "judge righteous judgment." This principle underlies the judicial rule of construction, which says that the courts will look through the form to the substance. Now, on its face, this statute in some respects appears to provide for a proceedings *in rem*—a proceeding solely against the land. But in reality it does not stop there. Under the guise of a proceeding *in rem*, it seeks to adjudicate and take away the property right of the owner, in and to the land, vested in him as an individual, a person, and to forever foreclose and bar his right to redeem it; and all this without naming the owner in the suit, or serving him with judicial process, even though he lives in the very county where the proceeding is instituted. Suppose the Legislature should by a statute attempt to provide this sort of procedure for the foreclosure of mortgages; could it be contended for a moment that such an act would afford due process of law? Certainly not. Nor does it stand the test of the Constitution merely because a municipality is the party plaintiff. It

might possibly stand the test if this act omitted the use and exercise of the judicial power and made all that is done under it administrative rather than judicial in its nature, incidences, and effects, and thus subject to review by the courts, in which courts due process, such as is appropriate to courts of justice, would be afforded the owner and all other parties having a substantial interest in the subject-matter. West Virginia Hotel Corporation *v.* Foster, 101 Fla. 1147, 132 So. 842. This statute attempts to make the courts proceed on the same rather meager and informal basis, as to notice and an opportunity to be heard, as might be valid if exercised by an administrative board or official, whose decisions are not final, but subject to judicial review, and yet gives to the adjudication of all questions in the proceeding the sanctity and finality which characterizes the usual judicial action of the courts. This cannot be done. The judicial process cannot be perverted in any such way. The courts are the last bulwark, the final protection, of the life, liberty, and property of the citizen, and the courts will never act unless due process of law is afforded. The courts will not try without personal service, when that is possible, or without appropriate constructive service, when personal service is not possible, and will never condemn without a fair opportunity to be heard. If the courts of this land ever depart from that principle, they will lose that confidence and respect which they have hitherto enjoyed, the preservation of which is absolutely essential to the maintenance of our form of government.

If this statute under which this suit was brought is carefully analyzed, it will be found that it attempts, under the guise of a suit *in rem*, to adjudicate and finally dispose of questions of property and personal rights which can only be adjudicated and finally disposed of in a suit *in personam*, or a suit *quasi in rem* and *quasi in personam*, in which due process of law, appropriate to courts of justice, must be afforded, but which due process of law is denied by this act. Blevins *v.* Smith, 104 Mo. 583, 16 S. W. 213, 13 L. R. A. 441. It is no reply to this to say that the tax is a lien on the land and constitutes no personal liability against the owner. The fact remains that the owner retains a

valuable right—a right to pay the tax and redeem, and thus save his property, and a right to be heard before his title is divested by a court, which rights are personal to him, and cannot be taken away without due process.

Nor is the proceeding authorized by this statute merely a step in an administrative program for the levy and collection of taxes. All steps in such a program are administrative and subject to judicial review. The statute constitutes a cunningly devised scheme to reduce the courts to the grade of mere administrative functions and yet retain the solemn and final consequences which characterize judicial action, without affording that firm basis of due process of law which the Constitution requires as the primary basis for judicial action.

Our recent case of Milton *v.* City of Marianna, 144 So. 400, involved a statute which required the suit to be filed against the owners of the property—a different kind of statute from the one involved here.

The bill in this case was clearly multifarious, and would have been subject to dismissal on that ground alone. The Legislature may authorize the courts to entertain a multifarious bill, but it cannot compel the courts to do so. To attempt such compulsion would be to invade the domain of the judicial power. I believe it was Edmund Burke who said, "You cannot indict a whole nation." Neither can you sue thousands of different pieces of land owned by thousands of different and unrelated persons and corporations in one suit without violating the well-settled rule against multifariousness, as well as the conception of "cases in equity" which existed at the time our Constitution vested circuit courts with jurisdiction of "cases at law" and "in equity." The framers of our Constitution never envisaged such a piece of judicial machinery as this statute attempts to create, as constituting a "case in equity." Indeed, far-reaching as this statute is, it does not in terms positively require the circuit court to entertain such a suit as this. True it is, the statute says: "There may be included in any such suit all or any part of the lands upon which tax certificates have been outstanding or taxes have remained delinquent," etc. In other words, the statute authorizes the complainant city to embrace in

one suit either all, or part, of the lands, upon which taxes are delinquent, but it does not compel the complainant to embrace all of such lands in one suit, nor does it compel the court to permit it to be done. If the chancellor should become convinced that the inclusion of over 10,000 separate parcels of land belonging to over 3,000 different persons would make it difficult or inconvenient for the court to deal justly with each parcel and with the numerous persons owning or having interest in the various parcels, the court would have the right, on motion, or *sua sponte*, to dismiss such a bill of complaint on the ground of multifariousness. Indeed it would appear that this statute attempts to construct somewhat of a judicial juggernaut, which, like the fabled Hindu car, would leave many suffering victims in its wake; and which would also tend to defeat its prime purpose by reason of placing on the block for forced sale at one time such numerous pieces of real estate as would tend to "glut the market" and diminish the price of each piece to such an extent as to render the cash revenues thus produced inadequate to meet the needs of the city or its creditors. This probable result might well be considered by a court in connection with this question of multifariousness.

But, aside from this question, I am persuaded that due process in suits in chancery to foreclose tax liens can only be afforded: (1) Where there is actual service of summons upon all known interested parties, who reside and can be found within the jurisdiction, and the usually recognized adequate forms of constructive or substituted service is had upon all others; or, possibly (2) where the statute creating the remedy itself fixes a definite time for the institution of such judicial proceedings and provides for notice to all interested parties, fairly apprizing them of the nature of the suit or demand and giving them reasonable time for appearance, to be effected by appropriate publication fairly made in the locality where the lands are situated. This statute does not comply with either of these principles.

The Nebraska statute, construed in Leigh *v.* Green, 193 U. S. 79, 24 S. Ct. 390, 48 L. Ed. 623, cited in the majority opinion, was quite different from the statute here under

review. One of the points of difference is that the Nebraska statute provided that service of process must be the same as in similar cases in the district court, but that, "where the owner of the land is not known, the action may be brought against the land itself." Nor does Hagar *v.* Reclamation District, 111 U. S. 701, 4 S. Ct. 663, 28 L. Ed. 569, appear to be in point, though there is some general language in the opinion which militates against the views above expressed. That case seems to have been concerned mainly with the validity of a special assessment of lands for a local improvement as provided for by a California statute—a part of the administrative tax program of the district—and the general observations might be construed as limited by the facts of that case. The eighth and ninth headnotes in that case read as follows:

"8. Where life and liberty or the title and possession of property are involved, due process of law requires that there be a regular course of judicial proceedings, and that the party to be affected shall have notice and an opportunity to be heard; but where the taking of property is in the enforcement of a tax, whether notice to him is necessary depends upon the character of the tax and the manner in which its amount is determinable.

"9. Where a tax is levied on property, not specifically but according to its value, to be ascertained by assessors, the law in prescribing the time when complaints will be heard, gives all the notice required, and the proceeding, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law; so, where the assessment may be revised by proceedings in the courts."

The case of Davidson *v.* City of New Orleans, 96 U. S. 97, 24 L. Ed. 616, does not support the statute here in question. The exact holding in that case is very well summed up in the fourth headnote, which is:

"4. In the present case, we hold that when such a burden, or the fixing of a tax or assessment by the statute of the State is required to be submitted to a court of justice before it becomes effectual, with notice to the owners and the

right on their part to appear and contest the assessment, this is due process of law within the meaning of the Constitution."

Nor is the case of Winona & St. Peter Land Co. *v.* Minnesota 159, U. S. 526, 16 S. Ct. 83, 87, 40 L. Ed. 247, opposed to the views above expressed. As the writer understands it, this was a case in which it was sought to review the assessment of omitted taxes for back years. This was a mere case of a general tax program, and did not involve the perfecting of any title. Under the Minnesota statute, as in some other States, instead of issuing tax deed, the original sale is through a court proceeding, which therefore becomes a part of the general collection scheme, and is equivalent to the issuance of a deed under our plan, and therefore does not require a personal notice. Moreover, such program is in accordance with a set plan to which citizens had become generally accustomed, and is carried out on fixed dates, while in our case the proceeding in question is merely an optional and irregular one, which may or may not be brought, and the taxpayer has no means of knowing when it is actually brought except through paper notice or by continually watching the court dockets, which would be an unreasonable burden. It is true that a citizen is expected to know that property will be sold for taxes if not paid, but he is only expected to be diligent in looking for such a sale when it is pursuant to a fixed program. This feature is commented upon as a very important one in the opinion of the court in the cited case in the following language:

"That the notice is not personal, but by publication is not sufficient to vitiate it. Where, as here, the statute prescribes the court in which and the time at which the various steps in the collection proceedings shall be taken, a notice by publication to all parties interested to appear and defend is suitable, and one that sufficiently answers the demand of due process of law."

See, also, in this general connection, Seaboard All-Florida Ry. *v.* Leavitt (Fla.) 141 So. 886, 889; opinion of Judge Loring in Tyler *v.* Judges of Court of Registration, 175 Mass. 71, 55, N. E. 812, 51 L. R. A. 436; Webster *v.* Reid,

11 How. 437, 13 L. Ed. 761; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565.

If this novel proceeding had worked our fairly and justly such result might be some argument in its favor. If it had resulted better than the old system, a further argument might be brought forward, but it suffers badly by comparison.

Taking the complainant's own figures that there are 1,531 persons and corporations interested as owners and incumbrancers of record, we find only 41 (R. 160) who appeared in this case. Of the 1,531 persons and corporations whose interests are to be affected by the suit, the huge number of 1,490 failed to appear. In other words, this novelty resulted in less than 3 per cent of appearances, indicating a wholly ineffective method of notice to those whose property is to be affected by the litigation.

If the 1,531 parties in interest, or a substantial portion thereof, had all received notice of the suit and appeared in the cause, this case would be a monument in litigation. Many diverse interests must of necessity exist, including claims of persons whose interests are given special protection by the law of this State. Persons in interest whose homesteads are involved could insist that the action as to them was premature, as our Legislature has provided that a tax certificate cannot be foreclosed upon a homestead until after the lapse of four years. Section 1003 (1) C. G. L. 1932, Supplement. A Federal receiver, such as the one appointed for the City National Bank in Miami, could insist upon a severance in order to have his case tried in the United States courts. The interests of minors and persons under disability are entitled to be protected by the appointment of a guardian *ad litem*.

The act assumes that the purchaser at the tax sale acquired only a lien upon the land which can only ripen into title by foreclosure proceedings. If this be true, I submit that the nature of this suit is such as to involve personal rights and property rights of the owners of the land, which tends to preclude the theory that it is an action purely *in rem* for the enforcement of the collection of the tax. While the tax may not be a personal obligation of the owner, and it is contended that the tax certificates sought to be fore-

closed in this suit constitute only a lien upon the land, the fact remains that then, on that theory, the title and the right of possession did not pass to the purchaser or purchasers at the municipal tax sale, and such purchaser would have no right to seize the property or deal with it as his own. Nor has the lower court seized the property. So it cannot be said that this case was a suit to dispose of property in *custodia legis*. Pennoyer *v.* Neff, *supra*.

The bill of complainant asks for relief against persons as opposed to relief asked for against lands alone, and the complainant prays that jurisdiction shall be taken by the court "of all parties interested in or having any lien upon any parcel of land described herein"; that persons or corporations appearing and defending be required to make answer according to chancery practice; that an accounting be taken and in default of payment that the lands be sold; that "any person or persons interested in any lands included in this suit may redeem such lands at any time prior to the sale thereof"; that "all parties interested therein or having any lien thereon" be forever barred and foreclosed of all their right; and that the purchaser at the sale be given full and complete possession, which last relief could only be granted by a writ of assistance against an occupant.

It seems from an examination of chapter 15038, Laws of 1931, that the Legislature attempted to authorize a suit in chancery, party personal in nature, without conforming to chancery requirements of naming and serving interested parties, although jurisdiction over them was contemplated. It is provided in section 4 of the act (chapter 15038) as follows:

"Jurisdiction of any of said lands and of all parties interested therein or having any lien thereon shall be obtained by publication of a notice to be issued as of course by the Clerk of the Circuit Court in which such bill is filed on the request of complainant."

The act also provides in section 5 thereof as follows:

"Each and every person and/or corporation interested in or having any lien upon any parcel of land described

in the bill of complaint shall be deemed a party to said cause."

The act itself (section 2), in addition to the specific provisions above quoted as to parties, does not provide, even if such a thing were possible, that the suit shall be an action *in rem* but only one "in the nature of proceedings *in rem*."

The act also provides in section 1 thereof as follows:

"The practice, pleading and procedure in any such suit shall be in substantial accordance with the practice, pleading and procedure for the foreclosure of mortgages of real estate, except as herein otherwise provided."

In view of these provisions as well as of the provisions and prayer for relief contained in the bill of complaint, I submit that this suit cannot, as contended by appellant, be considered as strictly an action *in rem*.

This case has been very ably briefed and argued by counsel for the respective parties, and the writer would attempt to analyze and differentiate other cases cited by counsel, if time and space permitted. Enough has been said, however, to indicate the principles and the reasoning underlying the conclusion which I have reached, that the act under which this proceeding was brought does not afford due process of law, and is therefore unconstitutional and void, and that the decree of the court below, so holding, should be affirmed.

ELLIS, *J.*, concurs.